

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DONOVAN CHAD BREVIK,
Petitioner,
v.
CHARLES SCHUYLER,
Respondent.

No. 2:23-cv-01639-KJM-EFB (HC)

ORDER AND FINDINGS AND
RECOMMENDATIONS

Petitioner is a state prisoner proceeding pro se in this writ of habeas corpus. 28 U.S.C. § 2254. Petitioner has filed motions for default judgment (ECF No. 27), for appointment of counsel (ECF No. 31), and to amend the petition (ECF No. 33). Also pending is a motion to dismiss filed by respondent. ECF No. 29. For the reasons that follow, the court will deny the motions for default judgment and counsel, grant the motion to amend, and direct petitioner to file a response to the motion to dismiss.¹

I. Motion for Default Judgment

On August 31, 2023, the court ordered respondent to respond to the petition within 60 days and to inform the court whether he consented to have the case heard before the assigned magistrate judge by November 2, 2023. ECF No. 18. Respondent timely informed the court

¹ As noted below, petitioner's amended petition does not render moot the issues raised in respondent's motion to dismiss.

1 concerning consent on October 11, 2023. ECF No. 23. After an expansion of the deadline to
2 respond to petitioner's filing of an amended petition on September 29, 2023, respondent timely
3 responded with a motion to dismiss on November 15, 2023. ECF No. 29. In the meantime,
4 petitioner filed a motion for default judgment, arguing that respondent had not timely complied
5 with the court's August 31, 2023, order. ECF No. 27. Because respondent responded within the
6 deadlines set by the court, petitioner's motion for default judgment must be denied.

7 **II. Motion for Counsel**

8 There currently exists no absolute right to appointment of counsel in habeas proceedings.
9 *See Nevius v. Sumner*, 105 F.3d 453, 460 (9th Cir. 1996). The court may appoint counsel at any
10 stage of the proceedings "if the interests of justice so require." *See* 18 U.S.C. § 3006A; *see also*,
11 Rule 8(c), Rules Governing § 2254 Cases. The court does not find that the interests of justice
12 would be served by the appointment of counsel at this stage of the proceedings.

13 **III. Motion to Amend**

14 Respondent has filed no opposition to petitioner's request to amend the petition.
15 Accordingly, the court will grant the request and accept the December 4, 2023, amended petition
16 (ECF No. 33) as the operative pleading in this action.

17 **IV. Response to Motion to Dismiss**

18 Though petitioner's amended petition was filed after respondent's motion to dismiss, the
19 issue raised by the motion to dismiss has not been obviated by the amendment. Respondent
20 argues that the petition must be dismissed because it contains an unexhausted claim of cumulative
21 error. The amended petition continues to claim cumulative error. Accordingly, the court will
22 direct petitioner to respond to the motion.

23 **V. Order and Recommendation**

24 Accordingly, IT IS HEREBY ORDERED that:

- 25 1. Petitioner's December 4, 2023, motion for appointment of counsel (ECF No. 31) is
26 DENIED;
- 27 2. Petitioner's December 4, 2023, motion to amend the petition (ECF No. 32) is
28 GRANTED and the December 4, 2023 amended petition (ECF No. 33) is accepted as

1 the operative pleading in this action;

2 3. Within 30 days of service of this order, petitioner shall file an opposition or statement
3 of non-opposition to the November 15, 2023, motion to dismiss (ECF No. 29).

4 IT IS FURTHER RECOMMENDED that petitioner's October 27, 2023, motion for
5 default judgment (ECF No. 27) be DENIED.

6 These findings and recommendations are submitted to the United States District Judge
7 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
8 after being served with these findings and recommendations, any party may file written
9 objections with the court and serve a copy on all parties. Such a document should be captioned
10 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the
11 objections shall be filed and served within fourteen days after service of the objections. The
12 parties are advised that failure to file objections within the specified time may waive the right to
13 appeal the District Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

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15 Dated: February 5, 2024

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17 EDMUND F. BRENNAN
18 UNITED STATES MAGISTRATE JUDGE
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